

**State of California  
California Regional Water Quality Control Board, Los Angeles Region**

**RESOLUTION NO. R4-2008-XXX**

**Termination of the Memorandum of Understanding regarding  
Onsite Wastewater Treatment Systems for the City of Malibu.**

**WHEREAS, the California Regional Water Quality Control Board, Los Angeles Region (hereinafter Regional Board), finds that:**

1. The Regional Board completed a Memorandum of Understanding (MOU) with the City of Malibu (City) on September 17, 2004, delegating the Board's authority to the City as a Qualified Local Agency to manage residential and small commercial septic systems to improve water quality in the Civic Center area, requiring that their discharge be 'consistent with any applicable state or regional water quality control plans and in the public interest.'
2. On September 4, 2008, the City notified the Regional Board of its intent to regulate its own discharge at Malibu Lumber under the MOU.
3. On September 5, 2008, the Regional Board notified the City and Weintraub Financial (Dischargers) of its intent to issue General Waste Discharge Requirements (GWDR) Order No. 01-031 for the discharge of non-restaurant flows less than 3,200 gallons per day and advised the Dischargers that "should Weintraub Financial-Malibu Lumber open without WDR (Waste Discharge Requirements), the Regional Board may, without further notice, take enforcement action for illegal discharge."
4. On September 12, 2008, the City reaffirmed its intent to issue a permit for Malibu Lumber Plaza under the MOU.
5. On September 19, 2008, the Regional Board issued a 30 days notice letter informing the City of Malibu of their intent to terminate the MOU for the City of Malibu.
6. The City is proceeding to construct and permit Malibu Lumber.

**Background**

7. After 2001, existing businesses in the Civic Center area, near Legacy Park and Malibu Lumber Plaza, were enrolled by the Regional Board in GWDR Order No. 01-031 with the expectation that a centralized waste water treatment plant would be constructed and/or the businesses' substandard septic systems would be upgraded.
8. A letter to interested parties from the Malibu City Manager dated July 11, 2003, states that "the Malibu City Council voted unanimously to embark on a course that will resolve sewage treatment issues in the Civic Center by installing a City

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- operated clean water facility...The concept involves the installation of a wastewater treatment facility along with storm water retention facilities near the Civic Center on the area currently known as the Chili Cook-off site..” The Malibu’s Civic Center Integrated Water Management Concept Plan of that date further defines the City’s plans. The document cites a detailed analysis of waste water collection, reclamation and reuse alternatives (Fuog, 1997). It further quotes the findings of the 2003 draft Questa study saying; “the Chili Cook-off property [Legacy Park] is a suitable area to provide capacity for the treatment, reuse and dispersal of waste water effluent produced in the study area when combined with recycling of treated waste water to the greatest extent feasible, groundwater recharge/percolation systems in the study area and irrigation of landscape/open space area.... (page 2).” In 2005, Questa completed a final study quantifying options for sewage disposal in the Civic Center area.
9. In 2007, City consultants found that the percolation capacity at Legacy Park was less than anticipated (pages 5-1, 6-1, 6-5). In 2008, the City proposed that additional effluent from the commercial development, Malibu Lumber, be discharged through irrigation and subsurface disposal in Legacy Park. These factors diminish the subsurface assimilative capacity in the Civic Center area. The subsurface disposal capacity estimated in the City’s final 2005 Questa report, when mounding is considered, is 58,000 to 67,000 gallons per day (gpd) and even without the reduced capacity at Legacy Park these flows are less than Questa’s predicted waste water treatment flows of 120,000 to 200,000 gpd.
  10. Recycling and Waste Water Treatment Plant (WWTP) capacities were again investigated by the Legacy Park contractor, but not quantified in the Legacy Park Final Environmental Impact Report (FEIR), uncertified at the September 23, 2008 Malibu Planning Commission meeting. The Legacy Park FEIR states that “a final decision has not been made regarding the type of technology or size of the waste water system.... the waste water treatment system is addressed at a programmatic level (page S-16).” This statement contrasts with the City’s integrated water management plan, completed in response to the Santa Monica Bay Bacteria Total Maximum Daily Load (TMDL).
  11. The Legacy Park FEIR lists 10 residential projects and 4 commercial and municipal projects in the Civic Center area which are proposed, in the planning stage, under construction, or recently completed. These projects create additional subsurface discharges that are or will be permitted by the City, or have pending Reports of Waste Discharge (ROWD) with the Regional Board. The City further states that the cumulative impacts of these projects are to be mitigated through Malibu’s Legacy Park Project because “the proposed project would have an overall beneficial impact on cumulative water quality by increasing the City of Malibu’s storm water treatment capacity (page 4-10).” The FEIR does not quantify water quality effects produced by groundwater level rise where ongoing development increases the volume of waste water generated. Cumulative discharge impacts may be resolved by a WWTP and/or other long term remedy.

### Report of Waste Discharge for Malibu Lumber

12. On May 7, 2007, the Regional Board received an ROWD or application for Waste Discharge Requirements (WDRs) for Malibu Lumber. On July 27, August 17, and September 27, of 2007, Regional Board staff provided written comments on the Final Environmental Impact Report for Malibu Lumber, noting that it did not assess the cumulative impacts from the project and other projects in the Civic Center area. Staff met with representatives of the City of Malibu every month there after until January 2008, when the Dischargers, the City of Malibu and Weintraub Financial, met with the Regional Board's Executive Officer. At that time, the City agreed to complete a groundwater study to assess mounding and cumulative impacts before Malibu Lumber opened.
13. In January 2008, Malibu Lumber began construction and the Malibu City Council approved funding for a groundwater study. However, the Request for Proposal (RFP) was not released until April 2008. Despite a meeting between Regional Board staff and the City and a March 3, 2008, letter from the Regional Board on deficiencies in the RFP concerning the absence of transient tests to assess short term critical conditions, the RFP was limited to an expansion of a previous steady state model based on existing Malibu well coverage and future collection of data from those wells.
14. Between February 2008 and August 2008, staff had multiple contacts with the City and Weintraub Financial representatives in an attempt to revise the engineering design to comply with state and regional water quality control plans and TMDLs.
15. A conditional approval of the ROWD was sent on May 16, 2008, signaling the Regional Board's readiness to prepare a WDR. The letter specified the commitments and additional technical documentation to be provided by the City and Weintraub Financial, specifically (a) engineering design for an upgrade treatment system to provide disinfection at the highest level of Title 22 standards, (b) locations for monitoring wells to continuously measure elevation of the water-table to ensure a minimum of five feet of separation is maintained from the base of the leach field to shallow groundwater and specifying modifications to facility operations sufficient to postpone discharge if five feet of separation was not maintained, (c) design ensuring the leach field is constructed to maintain a water quality of 1 milligrams per liter (mg/L) total nitrogen in the summer in the underlying groundwater and (d) use of the highest recorded groundwater levels and conservative percolation values in the final design of the leach field. Further, (e) documentation was required showing that the operation of Malibu Lumber would not preclude the operation of Legacy Park and/or a WWTP.
16. The technical material supplied by the Dischargers by August 25, 2008, did not address all of these issues and on September 5, 2008, the Regional Board issued a letter indicating that the ROWD was still considered to be incomplete.
17. The City and Weintraub Financial expressed concern that Malibu Lumber would not open as planned in October 2008, as the deadline for the appropriate Regional Board hearings had passed and there was insufficient time to receive public comment on an individual WDR for the facility. On September 12, 2008,

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the City reaffirmed its intent to issue a permit for Malibu Lumber under the MOU. The City is proceeding to construct and permit Malibu Lumber.

18. During the review of the Malibu Lumber ROWD, Regional Board staff found that the assimilative capacity of the Civic Center area is already exceeded under certain conditions. The existing Onsite Waste Water Treatment commercial systems in the Civic Center have systems which fail to adequately treat the entire volume of waste generated and which do not maintain the minimum 5 feet of separation. Existing mounding studies completed as part of WDR applications demonstrate that additional technical analysis will better characterize, but not eliminate, evidence that discharge may not be assimilated into the groundwater during periods of 30 days to 6 months during wet conditions without the creation of an unacceptable separation with the surface. Groundwater discharge during these periods violates State Board Resolution 68-16, "Statement of Policy with respect to Maintaining High Quality of Waters of California." Continued residential permitting, and pending requests for waste discharge applications for commercial facilities to the Regional Board are predicted to utilize an unknown, but growing, portion of the remaining disposal capacity for uses other than a waste water treatment system.
19. The Malibu Country Marts (MCMs) I, II, and III have demonstrated that the Civic Center area has reached its disposal capacity and MCMs have to pump and dispose of approximately 12% of their waste water offsite in order to maintain their septic system. The Regional Board has issued Notices of Violation to all three MCM for failure to comply with Time Schedule Orders. The City has not approved the construction of the advanced treatment systems required by the WDRs.

#### **Memorandum of Understanding**

20. The 2004 General Waste Discharge Requirements Order No. 04-0146, grants waivers for residential, and some small commercial facilities in jurisdictions where an MOU exists with the Regional Board.
21. The City of Malibu MOU states that Sections 13290 and 13291 of the California Water Code (CWC) "authorize the Regional Board to delegate implementation of these standards [state and regional water quality control plans] to a Qualified Local Agency (QLA)." Between 2007 and 2008, Regional Board staff clearly and repeatedly described the standards which the City should use in the oversight of Malibu Lumber project.
22. The City has failed to maintain the standards required in the MOU. The City has failed to provide sufficient engineering documentation to reasonably demonstrate that the low-flow high-strength discharge from Malibu Lumber will meet state and regional water quality control plan standards.
23. The City has not provided sufficient public process. In August 2008, the City moved the location of the Malibu Lumber leach field to discharge within Legacy Park. This action allocated subsurface disposal capacity, previously committed by the City to waste water disposal for the Civic Center to a private facility leasing

City property, after a Negative Declaration was certified by the City as lead agency, thereby limiting public comment on the change.

24. Section IX of the MOU is titled "Enforcement" and states that "Either party may terminate this MOU without cause upon thirty days written notice to the other party.....The Regional Board shall make any determination to terminate the MOU at a publically noticed hearing (page 7)."
25. The existing MOU allows the City to regulate its own discharge. The City did not impose and enforce Regional Board requirements for (a) public notice, (b) evaluation of impacts to adjacent properties, and (c) maintaining 5 feet of separation, despite Regional Board staff collaboration. Specifically, for sufficient public notice, the City should provide a minimum of 30 day public notice and comment period and notification of neighbors within 500 feet of the discharge before permitting or modifying any residential or commercial facility. In the presence of a negative public response, the City should forward the application to the Regional Board and not permit the facility under the MOU. To evaluate impacts to adjacent properties and before permitting a commercial or residential facility, the City should require a hydrological evaluation demonstrating that the additional discharge will not elevate the groundwater beneath adjacent properties to less than 5 feet under any conditions. The five feet of separation should be maintained at all times between the base of the leach or disposal field and the groundwater. Monitoring wells should be used or installed by the City to document the performance of all septic systems. If the separation to groundwater is not maintained, the City should forward the permit to the Regional Board for enforcement action and rescind the permit granted under the MOU. Finally, dischargers currently holding Regional Board WDRs and awaiting City approval for upgrades, should promptly receive or be denied that approval.
26. If the MOU is terminated without immediate re-negotiation, dischargers will be required to apply for WDRs for their discharge and may be subject to enforcement action if their effluent does not meet water quality objectives, if they did not previously receive a WDR from the Regional Board, or if the permit provided by the City of Malibu does not meet Regional Board standards.
27. If the MOU is terminated, the Regional Board could direct staff to prepare a septic system prohibition.

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**THEREFORE, be it resolved that:**

1. Pursuant to the Enforcement clause of the Memorandum of Understanding (MOU) for Onsite Waste Treatment Systems (OWTS) for the City of Malibu (City) which allows the Regional Board to terminate this MOU without cause upon thirty days notice; and
2. Thirty days notice to terminate the MOU was served on the City of Malibu on September 19, 2008;
3. The Regional Board terminates the MOU for Onsite Waster Treatment Systems for the City of Malibu.

I, Tracy J. Egoscue, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the California Regional Water Quality Control Board, Los Angeles Region, on November 13, 2008.

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Tracy J. Egoscue  
Executive Office